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No. 81-79

IN THE

Supreme Court of the United States

October Term, 1981

IN RE STATE OF MISSOURI, et al.,

Petitioners,

—v.—

UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF ARKANSAS and the HONORABLE CHARLES W. BAKER, et al.,

Respondents.

RESPONSE TO RESPONDENTS' SUPPLEMENTAL BRIEF

Dated: January 5, 1982

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Petitioners request that the Court strike respondents' supplemental brief on two independent grounds.* First, that 19-page brief exceeds the limit fixed by Rule 22 for supplemental and reply briefs. Secondly, despite the absence of a single reference in their supplemental brief to the appendices accompanying the petition and their own brief in opposition dated August 10, 1981, major portions of respondents' supplemental brief consist of their own version of the "facts" not supported either by any references to the record or by any documents included in the appendices. Respondents thus rely on undocumented recent developments in these Chapter 11 cases purportedly occurring even after the Eighth Circuit's decision was rendered, and also on events that may first unfold in the future—i.e., efforts by the bankruptcy trustee and others over "the last year in negotiating, drafting, preparing, and finalizing Trustee's Joint

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* Respondents' supplemental brief in opposition was received by petitioners' counsel by mail on January 4, 1982. "Res. Supp. Br." refers to that supplemental brief in opposition.

Plan of Reorganization," and its possible future confirmation. Res. Supp. Br., pp. 5, 15. Alternatively, in the event respondents' supplemental brief is not stricken, it is requested that the Court consider petitioners' responses set forth below.

The extraordinary circumstances posed by the present case are evident from the detailed description of this very litigation by the United States Senate Committee on the Judiciary contained in its Report dated July 27, 1981, No. 97-168 accompanying S.1365. S.1365 appears to be the bill to which respondents allude in their recent brief. Res. Supp. Br., pp. 16-17. That bill, while passed by the Senate, has enjoyed no progress in the House of Representatives and there appears to be no indication of any action by the Congress looking towards its enactment. S. Rep. No. 97-168 is nevertheless important because of its findings about the facts of this case.

In its Report, the Senate Committee specifically found (1) that the Missouri authorities took possession and control of the subject five Missouri warehouses on August 8, 1980, prior to the filing of the bankruptcy cases; (2) that for the most part, there was enough grain on hand at each of the warehouses to meet the outstanding receipts; (3) that Missouri's actions on August 12, 1980, the day after bankruptcy was filed, were to insure delivery of the stored grain to the warehouse receipt holders as rightful owners; (4) that the blockade by farmer-depositors of one of the warehouses resulted from their being required to sell additional grain to the trustee, who concurrently refused to release their stored grain to them; (5) that after United States Marshals appeared at the warehouse premises in force, the Missouri authorities involuntarily surrendered possession to the trustee on September 17, 1980 and that Missouri's surrender was only because the Missouri authorities were threatened with contempt by the bankruptcy court; (6) that the bankruptcy trustee alleged that he owned the grain, which claim was, in the view of the Missouri authorities, inconsistent with the provisions of the Missouri grain laws because the trustee admittedly held no documents of title; and (7) that the October 20, 1980 enforcement action in the state court was instituted by the State of Missouri to preserve the integrity of its grain laws. These facts, as found by the Senate Committee, are consistent with those alleged in petitioners'

petition for a writ of prohibition. Respondents' undocumented narration of the "facts" in their supplemental brief cannot withstand the uncontradicted allegations in that petition, Pet. A-46, para. 7 and A-48, para. 15(a), as fully corroborated by the extensive findings made by the Senate Committee on the Judiciary. Since enactment of S.1365 is doubtful, the bill does not by itself offer any prospect of resolving the jurisdictional issues posed by this case. Certiorari is thus necessary to resolve these problems.

Respondents candidly recognize that unless the grain constituted "property of the estate", there would have been no basis for the determination below that the bankruptcy court had subject matter jurisdiction over it. Res. Supp. Br., pp. 2, 3, 7, 8. Moreover, unless the grain also constituted property of the estate *as of the date of bankruptcy*, August 11, 1980, the grain could not have become part of the debtors' estates created by § 541 of the Bankruptcy Code. In addition, unless the debtors owned all of the grain "as of the commencement of such [bankruptcy] case", none of the grain would have been within the subject matter jurisdiction of the bankruptcy court as established by 28 U.S.C. § 1471(e).

Respondents now attempt to meet these jurisdictional requirements by the bald claim that the trustee "had actual exclusive possession of all Missouri grain . . . as of the date of the filing of the voluntary Chapter 7 petitions on August 11, 1980." Res. Supp. Br., pp. 1-2. However, they cite no factual basis for their statement. Moreover, their statement is contrary to the record as well as the findings of the Senate Committee.* Further, although the court below treated the debtors as if they had a possessory interest in the grain on the date of bankruptcy because of the absence of any *state court order* interfering with

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* In addition, respondents previously acknowledged that prior to bankruptcy, specifically on August 8, 1980 (erroneously referred to by respondents as of August 8, 1981), the debtors delivered to petitioners "documents purporting to surrender possession and custody of the Missouri elevators to petitioners." Respondents August 10, 1981 Brief in Opposition, p. 3. The Eighth Circuit itself acknowledged that "[t]hree days prior to the filing of the bankruptcy proceedings, the debtors authorized the Missouri Department of Agriculture to assume control of the grain in their Missouri warehouses." *State of Missouri* v. *U.S. Bankruptcy Court*, 647 F.2d 768, 771 (8th Cir. 1981).

the debtors' supposed right to possession, 647 F.2d at 774, n.12, its analysis had no factual support. See, petitioners' reply dated December 23, 1981, p. 4. Indeed, nothing in the record lends any credence to respondents' claim that the debtors had possession on the date of bankruptcy. Contrariwise, the record establishes by uncontroverted documents that the Missouri authorities had sole possession prior to the date these bankruptcy cases were commenced, Pet. A-46, para. 7; Pet. A-48, para. 15(a), which is corroborated by the Senate Committee's findings. Respondents point to nothing as a cure for the lack of possession precluding a finding of jurisdiction.

Even if respondents or the debtors had had possession, their claim that mere possession was sufficient to create subject matter jurisdiction in the bankruptcy courts must fail. There could be no "property of the estate" within the meaning of § 541 of the Bankruptcy Code by reason of a debtor's possession of property as a *mere bailee*. Here, the grain admittedly was deposited for storage with the debtors as bailees. Naked possession under a bailment for storage does not elevate the possessory interest to the level contemplated by Congress as necessary to create § 541 property of the estate. Section 541 could not be read otherwise with with respect to stored property in which the bailee had no right of use or enjoyment. Petitioners' reply dated December 23, 1981, p. 7.

Elaborate financial analyses are advanced by respondents in their effort to create the impression that the estates have a substantial financial interest in this grain. Res. Supp. Br., pp. 3-5. In essence, respondents claim unpaid storage charges, as well as post-petition fees, interest and expenses they attribute to the Missouri grain, aggregating approximately $1,537,000. The reality is that no factual basis can be found in the record to support these claims, most of which first arose only after petitioners' prohibition petition was filed in the district court and some of which arose as recently as two months ago, or even later. Moreover the argument based on these expenses is a bootstrap contention. If the grain is not property of the estate, there would be no legal basis to make these charges. The charges thus cannot serve to create a claim of the trustee against the grain. In the absence of such a claim, neither the trustee nor the debtors would have any interest in the grain.

Respondents' reasoning is circular. Finally, since these expense claims arose after the bankruptcy cases were commenced they could not exist as of the earlier crucial date required by both 28 U.S.C. § 1471 and Code § 541.

Respondents' reliance on § 506(c) of the Bankruptcy Code as a predicate for these costs and expenses is misplaced. Section 506(c) merely permits a charge by a bankruptcy trustee against "property securing an allowed secured claim" for the costs of preserving such property. Thus, the statute only permits such a charge against property which constitutes *collateral* for a claim of a *secured creditor.* Here, virtually all of the grain was owned by third parties. Section 506(c) does not authorize any charge against the *owner* of property. Section 506(c) thus has no relevance to this case.

Respondents' attempts to downgrade the importance of the admitted fact that "no documents of title" were presented by the bankruptcy trustee to substantiate his unfounded claim of ownership. 647 F.2d at 774. Respondents thus advance a section of the Missouri grain law as a predicate for their claim that there was "an overage position" that vested some grain ownership in the debtors. These "facts", however, are not in the record. The record is clear that 2.3% of the grain is what was owned by the debtors. That minute quantity was never in dispute, whereas the estates never had any bona fide interest in the vast bulk of the grain.

Respondents now offer for the first time an unfiled plan of reorganization as a foundation for subject matter jurisdiction. Res. Supp. Br., pp. 5-6. That plan too is not part of the record. Not only do respondents claim that this non-existent, unfiled and unidentified plan presently creates jurisdiction, but they even seem to claim it as a basis for the existence of jurisdiction at the much earlier, crucial date of bankruptcy, August 11, 1980, even though no claim has been made by respondents that this jurisdiction-generating plan of reorganization was in gestation at that early date. Thus, respondents' supplemental brief refers to a "joint plan of reorganization" that may be filed in the future by the trustee in these Chapter 11 cases. They claim that if that yet-to-be-filed plan should hereafter be confirmed by the bankruptcy court, "all disputes relative to the . . . grain will be resolved." On the other hand, the trustee prophetizes

that if his would-be plan is not confirmed, then controversies about the grain "will have to be resolved by whatever court or courts of competent jurisdiction are finally determined to have subject matter jurisdiction over the Missouri grain sale proceeds." Res. Supp. Br., p. 5. Respondents' position is ludicrous. Surely an unfiled and unknown plan that is not even part of the record cannot presently serve to create subject matter jurisdiction as of the date of bankruptcy in the event it is subsequently confirmed, and also presently to create jurisdiction pending its possible filing and confirmation at some unidentified future time. Nothing but tricks or fiction can turn this grain into property of the estate or otherwise create jurisdiction over it.

Respondents' claim that these estates really had a property interest in the grain is belied by the Eighth Circuit's finding that "[t]he trustee, however, has presented no documents of title to substantiate his claim of ownership." 647 F.2d at 774. In view of that lack of documentation, the bankruptcy trustee's "ownership" litigation based on his undocumented claim in essence seeks to enlarge the estate either by effecting some recovery before the bankruptcy court or by obtaining a settlement from the true owners of the grain. Success would presumably be rewarded by fee allowances, and the creditors would also benefit. The losers would be the grain owners, the very class to be protected by the state grain laws.

Respondents have equivocated. They merely say that it "appears" that some warehouse receipts may not comply with Missouri law; that it "appears" that some farmers caused title to pass; that "it also appears that the trustee has title to other quantities of Missouri grain"; that there are "difficult questions of law and fact requiring much testimony"; and that the "trustee anticipates that as a result of such complex litigation, if necessary, [estimated by the trustee at 12 weeks or more], the debtors' ownership interests in the Missouri grain will increase substantially." Res. Supp. Br. pp. 5-6. In essence, all that respondents assert in their recent brief is a series of equivocal statements supported by "no documents of title", 647 F.2d at 774, and unsupported by anything in the record. Nor is respondents' rhetoric shored up by their reliance on Grain Storage Agreements apparently made with Commodity Credit

Corporation "for long-term grain storage" or by the "storage contracts with individual Missouri and Arkansas farmers." Res. Supp. Br., p. 3. The very existence of these various storage agreements actually demonstrates the lack of any property interest on the part of the debtors at the crucial date of bankruptcy because they show that the debtors had no right to use or enjoy the grain.

Reliance by respondents on §§ 542 and 543 of the Bankruptcy Code is also misplaced. Each of those statutes is limited in operation and effect to "property of the estate". Thus, § 542, dealing with the turnover of property to the estate, refers to property that the trustee may use, sell or lease under § 363 of the Bankruptcy Code. Section 363, in turn, in subdivisions (b) and (c), is explicitly limited in scope to "property of the estate". The other statute, § 543, also applies only to "property of the estate". The weakness of respondents' position lies in the fact that they *assume* that the grain somehow became "property of the estate" through the operation of §§ 542 and 543. But since those sections, by their terms, only operate with respect to "property of the estate", their argument does nothing more than beg the question. See, Res. Supp. Br., p. 2. Further, respondents' contention based on § 363(f)(4) of the Bankruptcy Code is another *non sequitur.* As recognized by respondents themselves, § 363(f) merely authorizes a sale by a trustee under either subsection (b) or (c) of § 363. Res. Supp. Br., p. 7. Those subsections, in turn, are limited in their operation and effect to "property of the estate". Therefore, § 363(f) cannot serve as a basis for finding that the grain is "property of the estate".

The grant of broad subject matter jurisdiction to the bankruptcy courts by 28 U.S.C. § 147[illegible]rged by respondents as a basis for finding subject matter jurisdiction over grain that was not property of the estate or of the debtor "as of the commencement of such [bankruptcy] case", as required by that statute. However, no one has asserted that the enlarged jurisdiction of the bankruptcy courts is universal. This case exemplifies that there are limits. Respondents, moreover, have incorrectly described the bankruptcy court created by the 1978 legislation "as an adjunct of the district court." Res. Supp. Br., p. 7. Although characterized as an "adjunct" by 28 U.S.C.

§ 151, enacted by § 201(a) of Public Law 95-598, § 201(a) does not take effect until April 1, 1984 by virtue of § 402(b) of that statute. The controlling section is § 404(a) of Public Law 95-598. It provides that during the transition period ending on March 31, 1984, the courts of bankruptcy created by § 2a of the Bankruptcy Act shall constitute "a separate department" of the district court. The lesser status accorded the courts of bankruptcy as *departments* during the transition period as compared with their *adjunct* status during the post-1984 period, thus gives rise to doubt as to Congressional intent as to the scope of the jurisdiction of the bankruptcy courts during the transition period. Indeed, the statutes on which respondents rely contemplate that jurisdiction will be founded on "property of the estate" as set forth in 28 U.S.C. § 1471 and §§ 363 and 541 of the Bankruptcy Code, or on the need to carry out the provisions of title 11, as set forth in § 105 of the Bankruptcy Code. Further, 28 U.S.C. § 1481 does not by its language, and was not intended by Congress to, enable courts of bankruptcy to determine the fate of property not constituting "property of the estate". The enlarged jurisdiction contemplated by 28 U.S.C. § 1471 was not intended to be all-inclusive as urged by respondents. H. Rep. No. 95-595, pp. 445-46; S. Rep. No. 95-989, pp. 153-54.

Respondents claim that a petition for a writ of prohibition should be denied on the authority of *In re Chicago, Rock Island & Pacific Railway Company*, 255 U.S. 273 (1921). Res. Supp. Br., pp. 12-13. It was there held that an extraordinary writ should not be issued against a district court merely because it might hold a special appearance by the petitioner to be a general appearance. Obviously, as stated in the decision, since the petitioner "will have its remedy by appeal", there was no need for an extraordinary writ. 255 U.S. at 280. The present case is vastly different. Here, petitioners are a sovereign state and its officials. Bloodshed was a risk. The grain owners felt aggrieved by the trustee's refusal to release possession of their grain to them, while at the same time requiring them to sell additional grain to the trustee. The farmers blockaded a warehouse. The trustee demanded possession from petitioners.

Respondents invoked the federal marshals. Petitioners were threatened with contempt. Petitioners decided not to acquiesce in respondents' exercise of asserted jurisdiction that petitioners believed in good faith to be beyond respondents' powers.

The circumstances were extraordinary. The petition sought to confine the court of bankruptcy to its lawful jurisdiction only after the bankruptcy trustee, without basis, asserted ownership of all of the grain. This blatant attempt to gain ownership of the grain for the debtor estates and their creditors lacked supporting documentation. Public danger resulted from the bankruptcy trustee's positions and actions. These circumstances brought this case within the principle warranting the issuance of a writ of prohibition in favor of a government or public officials so as to confine an inferior court to its lawful jurisdiction and to enable public officials to test the power of a court without risking serious sanctions, including possible jail sentences, for contempt of the inferior court.

Respondents now retreat from their earlier position that the federal bankruptcy laws supersede state receivership proceedings. Compare, respondents' Brief in Opposition, p. 18 with Res. Supp. Br., p. 10. Respondents thus chose not to respond to the analysis contained in petitioners' reply dated December 23, 1981 based on *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819). Although respondents still contend that the Missouri grain laws provide for "involvency" proceedings, they no longer claim that such proceedings are "bankruptcy" proceedings. Since the Bankruptcy Clause of the Constitution merely empowers Congress to legislate on the subject of "bankruptcies", state grain law proceedings, even if they are "insolvency" proceedings, are not superseded or overruled.

CONCLUSION

Petitioners respectfully request that this Court issue a writ of certiorari.

Respectfully submitted,

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